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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

70-5112

WILLIE MAE WEBER,

Petitioner,

—v.—

AETNA CASUALTY & SURETY COMPANY and EARL GIBBONS
TRANSPORT COMPANY, INC.,

Respondent.

MOTION OF AMERICAN CIVIL LIBERTIES UNION
FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*,
AND BRIEF *AMICUS CURIAE*

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TABLE OF CONTENTS

	PAGE
Motion of American Civil Liberties Union for Leave to File Brief, <i>Amicus Curiae</i>	1
Interest of <i>Amicus</i>	3
Statement of the Case	3
The Question Presented	5
Argument	5
I. The Louisiana law denying workmen's compensa- tion benefits to dependent children because of their illegitimate birth violated the Equal Protection Clause as applied by the Court in <i>Levy v.</i> <i>Louisiana</i> and <i>Labine v. Vincent</i>	6
A. The holding of <i>Levy</i>	6
B. <i>Levy</i> was correctly decided. Its holding is not impaired by <i>Labine</i>	7
C. The holding in <i>Levy</i> applies precisely to the facts of this case	10
D. <i>Labine v. Vincent</i> should be limited to issues involving inheritance	13
II. The discrimination imposed against the illegiti- mate children in this case violates the Due Process Clause of the Fourteenth Amendment because it furthers no valid state purpose and it deprives them of rights on the basis of a status over which they have no control	14
CONCLUSION	18

AUTHORITIES CITED

PAGE

Cases:

Bolling v. Sharpe, 347 U.S. 497 (1954)	15
Brown v. Board of Education, 347 U.S. 483 (1954)	9
Eichorn v. New Orleans & C. R. Lt. & P. Co., 114 La. 712, 38 So. 526 (1904).....	11
Glona v. American Guarantee & Liability Insurance Co., 391 U.S. 73 (1968)	8
Graham v. Richardson, 403 U.S. 365 (1971)	9
Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U.S. 150 (1896)	7
Harper v. Board of Elections, 383 U.S. 663 (1966)	9
Hirabayashi v. United States, 320 U.S. 81 (1943)	9
In Re Vincent, 229 So.2d 449 (La. Ct. App. 1969)	13
Labine v. Vincent, 401 U.S. 532 (1971)	5, 6, 7, 10, 13, 14
Levy v. Louisiana, 192 So.2d 193 (1966), <i>cert. denied</i> 250 La. 25, 193 So.2d 530 (1967)	6
Levy v. Louisiana, 391 U.S. 71 (1968)	passim
Lyeth v. Hoey, 305 U.S. 188 (1938)	7, 13
Mager v. Grima, 8 How. 490 (1850)	7, 13
Marey v. Doud, 354 U.S. 457 (1957)	7
McLaughlin v. Florida, 379 U.S. 184 (1964)	9
Meyer v. Nebraska, 262 U.S. 390	15
Oyama v. California, 332 U.S. 633 (1948)	9, 16

	PAGE
Pierce v. Society of Sisters, 268 U.S. 510	15
Robinson v. California, 370 U.S. 660 (1962)	15, 16
Schware v. Bd. of Bar Examiners, 353 U.S. 232 (1957)	15
Shapiro v. Thompson, 394 U.S. 618 (1969)	9
Stokes v. Aetna Casualty and Surety Co., 257 La. 424, 242 So.2d 567 (1971)	12
Williams v. American Emp. Ins. Co., 237 La. 101, 110 So.2d 541 (1959)	13
Williamson v. Lee Optical Co., 348 U.S. 483 (1955)	7, 15
<i>Constitutional Provisions:</i>	
United States Constitution	
Article III, Section 3, Cl. 2	16
Eighth Amendment	15
Fourteenth Amendment	5, 6, 14, 15, 17
<i>Federal Statute:</i>	
18 U.S.C. §3563 (1948)	17
<i>State Statutes:</i>	
Louisiana Revised Statutes	
LRS 23:1021(3)	5, 12, 13
LRS 23:1232	5
<i>Other Authorities:</i>	
Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Offi- cers, and the Like, 3 Crim. L. Bull. 205 (1967)	16

PAGE

Cheit, <i>Injury and Recovery in the Course of Employment</i> , 10 (1961)	11
Fuller, THE MORALITY OF LAW 39 (1964)	15
Gray and Rudovsky, <i>The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Co.</i> , 118 U. Pa. L. Rev. 1 (1969)	9
Holdsworth, 3 HISTORY OF ENGLISH LAW 69	17
McKay, <i>Political Thickets and Crazy Quilts: Reapportionment and Equal Protection</i> , 61 Mich. L. Rev. 645 (1963)	8
Speiser, <i>Recovery for Wrongful Death</i> , iii-iv, 12 (1967). .	8

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TRANSPORT COMPANY, INC.,

Respondent.

Motion of American Civil Liberties Union for Leave to
File Brief, *Amicus Curiae*

Pursuant to Rule 42(3) of the Rules of this Court, the American Civil Liberties Union respectfully moves for leave to file a brief *amicus curiae* in the above-entitled case. The attorney for petitioner has consented to the filing of the attached brief. The attorney for respondent refused consent. The respective letters have been filed with the Clerk.

The American Civil Liberties Union has a long-standing institutional interest in protecting the constitutional rights of children, legitimate and illegitimate. Attorneys of the American Civil Liberties Union appeared before this Court in recent years to argue *In Re Gault*, 387 U.S. 1 (1967) and *Levy v. Louisiana*, 391 U.S. 68 (1968). The former decision held that children involved in juvenile proceed-

ings were entitled to a wide range of constitutional protections in such proceedings. The latter decision held that illegitimate children were entitled as a constitutional matter to pursue an action for money damages incurred by the wrongful death of their natural mother. The Union also filed an *amicus curiae* brief in *Labine v. Vincent*, 401 U.S. 532 (1971).

The case at bar draws into question the right of illegitimate children to benefit from Louisiana's workmen's compensation laws upon the death of their natural father. The question is a complex one which involves construction of the equal protection clause of the Fourteenth Amendment. We believe that our brief will be of substantial assistance to the Court.

Respectfully submitted,

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**BRIEF OF AMERICAN CIVIL LIBERTIES UNION,
*AMICUS CURIAE***

Interest of *Amicus*

The interest of *Amicus* is set out in the Motion for Leave to File, *supra*.

Q **Statement of the Case**

Henry Clyde Stokes was killed in Louisiana while in the course and scope of his employment.

At the time of his death, Stokes maintained a family unit out of wedlock with Willie Mae Weber. Included in the household were the four legitimate minor children born of the marriage between Stokes and Adlay Jones Stokes, who was at the time committed to a mental hospital, and one unacknowledged illegitimate child born of the relation-

ship between Stokes and Weber. A second illegitimate child of Stokes and Weber was born posthumously.

After Stokes' death, the four legitimate children, through their maternal grandmother as guardian, filed a claim under Louisiana's Workmen's Compensation Law. The defendant employer and its insurer, Aetna Casualty and Surety Company, converted the matter into an interpleader action and impleaded, among others, the two illegitimate children of Stokes and Weber. Weber appeared and claimed compensation for the two illegitimate children.

In the meantime, an action was brought by the four legitimate children against a third-party tort feasor. The suit was settled for an amount in excess of the maximum benefits allowable under workmen's compensation. The illegitimate children did not share in the settlement. Subsequently, the employer requested that the claim for workmen's compensation be rejected for all parties.

After trial on the merits, the trial judge rendered a judgment awarding all of the workmen's compensation benefits to the four legitimate children and declaring that their entitlement was satisfied by the tort suit settlement. Judgment was rendered in favor of Willie Mae Weber, for the use and benefit of the illegitimate children, to the extent that the maximum compensation benefits were not exhausted by the four legitimate children. Since such benefits were completely exhausted by the amount of the tort settlement, the illegitimate children received no part of the award while the legitimate children shared the entire amount.

The judgment was affirmed against constitutional objections by the Louisiana Court of Appeal and the Supreme Court of Louisiana.

The Question Presented

Whether Louisiana Revised Statutes (LRS), Title 23, Sections 1021 (3) and 1232, which deny recovery under the workmen's compensation statute to unacknowledged illegitimate dependent children for the death of their father, where such benefits are exhausted by the claims of the father's legitimate children, are invalid under the Fourteenth Amendment to the Constitution of the United States.

Argument

In this case involving discrimination against minor, dependent children because they were born out of wedlock, there are three principal issues. The first two—equal protection and due process—are discussed in Points I and II of this brief, *infra*.

The third issue, which is inextricably involved with the other two issues, is *stare decisis*. Simply stated, the question is whether the Court desires to overrule *Levy v. Louisiana*, 391 U.S. 71 (1968), which held that the Fourteenth Amendment invalidated a Louisiana wrongful death statute that denied recovery to unacknowledged illegitimate children of the deceased. In *Labine v. Vincent*, 401 U.S. 532 (1971), decided last term, the Court distinguished the *Levy* case but explicitly re-affirmed its holding. We suggest that there is no principled legal basis to distinguish the instant case from the *Levy* decision. Accordingly, the decision of the court below should be reversed on *Levy*'s authority.

I.

The Louisiana law denying workmen's compensation benefits to dependent children because of their illegitimate birth violated the Equal Protection Clause as applied by the Court in *Levy v. Louisiana* and *Labine v. Vincent*.

A. *The holding of Levy*

In *Levy v. Louisiana*, 391 U.S. 71 (1968), the Court struck down as violative of the equal protection clause of the Fourteenth Amendment that part of the Louisiana wrongful death statute which denied recovery to unacknowledged illegitimate children of the deceased. The Court rejected the argument of the Louisiana Court of Appeal that the distinction between legitimate and illegitimate children served a reasonable state interest in "morals and general welfare because it discourages bringing children into the world out of wedlock." *Levy v. Louisiana*, 192 So. 2d 193, 195 (1966), cert. denied 250 La. 25, 193 So. 2d 530 (1967). This Court's opinion focused on the relationship between the legitimacy-illegitimacy distinction and the nature and purpose of the wrongful death statute.

"Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother We conclude that it is invidious to discriminate against them [illegitimate children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother." 391 U.S. at 72.

In *Labine v. Vincent*, 401 U.S. 532 (1971), the Court refused to extend the rationale of *Levy* to prohibit certain

distinctions in state inheritance statutes based on legitimacy. Special emphasis was placed upon the interest of the state in regulating the disposition of private property by inheritance or otherwise, as historically recognized by the Court in previous decisions. See *Mager v. Grima*, 8 How. 490, 493 (1850); *Lyeth v. Hoey*, 305 U.S. 188, 193 (1938) (cited in *Labine* at 401 U.S. 539, n. 16). The *Labine* opinion re-affirmed the validity of the *Levy* holding, but "decline[d] to extend the rationale . . . where it does not apply." 401 U.S. at 535.

B. Levy was correctly decided. Its holding is not impaired by Labine

In *Levy*, the Court suggested that both the "reasonable basis" and the "compelling state interest" tests for determining questions arising under the Equal Protection Clause were applicable, and that the discriminatory classification at issue was invalid under either approach.

The "reasonable basis" standard requires that any state classification bear a reasonable relationship to a legitimate state purpose.

"[T]he attempted classification . . . must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155 [1896].

See also *Morey v. Doud*, 354 U.S. 457 (1957); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

The judgment in *Levy* that the legitimate-illegitimate distinction bore no relationship to the purposes of the wrong-

ful death statute surely was correct. Prohibiting recovery by illegitimate in no way can be said to further the laudable state goal of compensating children who have lost a parent through the wrongful action of another. See S. Speiser, *Recovery for Wrongful Death*, ii-iv, 12-13 (1967). The opinion did not deal with the State's claim that the classification served the State's purpose in regulating morals and general welfare, apparently considering such assertion baseless. That issue was taken up in the companion case of *Glona v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968), where it was dismissed as "farfetched." *Id.* at 75. Certainly this judgment was correct, for "it would be truly remarkable if persons contemplating or in the process of producing a child out-of-wedlock would be deterred by the possibility that the child would not be able to recover for their wrongful death."¹

The "compelling state interest" test, alternately applied in *Levy*,² analyzes the nature of the characteristics or traits used to determine the classification and also the scope of individual conduct regulated or proscribed by the statute. If upon such examination it is found either that the classification is based upon an "inherently suspect" characteristic, or that the regulation infringes upon a "fundamental right and liberty," the presumption of constitutionality normally accorded state enactments is reversed. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 Mich. L. Rev. 645, 666, 667 (1963). The statute will stand only if there "clearly appears . . . some

¹ Brief for Appellant in *Levy v. Louisiana*, p. 14.

² See 391 U.S. at 71, paragraph 2: ". . . we have been extremely sensitive when it comes to basic civil rights . . . The rights asserted here involve the intimate familial relationship between a child and his own mother."

overriding statutory purpose . . ." *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964), or it is "necessary to promote a compelling governmental interest." *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). See also *Oyama v. California*, 332 U.S. 633, 640 (1948); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Harper v. Board of Elections*, 383 U.S. 663, 669, 670 (1966).

To the extent that the Court's decision in *Levy* rested upon a "compelling interest" analysis, it was on solid ground. For classifications most often are suspect when they rest upon a status over which an individual has no control, such as race, *Brown v. Board of Education*, *supra*; ancestry or nationality, *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), or alienage, *Graham v. Richardson*, 403 U.S. 365 (1971). It is obvious that a child can no more control his legitimacy than he can control his race or ancestry. The illegitimate child is as entitled as the black child or the Japanese-American child to treatment as an individual rather than as a member of a minority group to which he belongs by the fact of birth. The state should be required to meet the same standard to justify discriminatory treatment of illegitimates as it must concerning racial, national or ethnic minorities.³ See Gray and Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Co.*, 118 U. Pa. L. Rev. 1, 5-7 (1969).

³ Discriminatory treatment of the parents of illegitimate children, to the extent that it does not affect the illegitimate children themselves, might be given broader leeway, as the parents obviously have more control over giving birth to an illegitimate child than the child has over being born illegitimate. But there still must be a rational relationship between the discrimination and a legitimate state interest. See *Glona v. American Guarantee & Liability Co.*, *supra*.

C. *The holding in Levy applies precisely to the facts of this case*

In *Labine v. Vincent, supra*, Justice Black explained the holding in *Levy*:

"... The cause of action in *Levy* was in tort. It was undisputed that Louisiana had created a statutory tort and had provided for the survival of the deceased's cause of action, so that a large class of persons injured by the tort could recover damages in compensation for their injury. Under those circumstances the Court held that the State could not totally exclude from the class of potential plaintiffs illegitimate children who were unquestionably injured by the tort that took their mother's life." 401 U.S. 535-36.

The opinion further explained that in *Levy* the State "created an insurmountable barrier" to the illegitimate child, unlike the *Labine* situation. 401 U.S. at 539.

The instant case meets the standards of *Levy* as explained in *Labine* in the following ways:

1. *The state has created an injury-compensation scheme, similar to a tort remedy, in favor of a large class of potentially injured persons.*

The wrongful death statute at issue in *Levy* was typical of similar statutes enacted in the various states of this country and in England. Its traditional compensatory purpose was early set forth by the Supreme Court of Louisiana:

"[T]he object of this law was to save [children] harmless during their minority from the loss of benefits (material and moral) which they would have received

had their father lived up to the time of their respective majorities." *Eichorn v. New Orleans & C. R. Lt. & P. Co.*, 114 La. 712, 724, 38 So. 526, 530 (1904).

The workmen's compensation statute at issue here is identical in purpose and even broader in scope than the wrongful death statute involved in *Levy*. Prior to its passage, an employee suffering an occupational injury—or his family in the case of death—could obtain financial relief only through a tort action. Workmen's compensation laws sought to remove the often difficult burden of proof involved in such a lawsuit by offering an alternate, surer, but usually less remunerative recovery for work-related injuries. An employee choosing to sue under a workmen's compensation law was foreclosed from initiating a tort action against his employer. See Cheit, *Injury and Recovery in the Course of Employment*, 10 *et seq.* (1961).

In the instant case, the recovery sought under the workmen's compensation statute is in lieu of an action under the very same wrongful death statute which was at issue in *Levy*. Thus, the interests of the illegitimate children here are precisely the interests which the Court protected in *Levy*, and a classification limiting or prohibiting the recovery of illegitimates bears no more rational relationship to the purposes of a workmen's compensation statute than it does to a wrongful death statute. As Justice Barnham of the Louisiana Supreme Court recognized in dissent below:

"Compensation law is social law designed to make an employee's inability to produce income because of an employment associated injury an element of the cost of production of goods and services. . . . The State owes

every child, legitimate or illegitimate the same duty, and when the state adopts legislation to relieve itself of the support of children, a classification which prefers legitimate over illegitimate appears to be unwarranted." *Stokes v. Aetna Casualty and Surety Co., 257 La. 424, 242 So.2d 567, 572 (1971).* (Emphasis in original.)

2. *The state has created an "insurmountable barrier" to the illegitimate children involved in this case.*

The father of the two illegitimate children in this case was also the father of four previous legitimate children, to whose mother he remained married until his death. The illegitimate children were precluded *totally* from sharing in a workmen's compensation award because the fund was exhausted by the legitimate children. Had the illegitimate children been acknowledged or legitimatized, they could have shared the fund on an equal basis with the legitimate children. Both children were precluded from such status by Louisiana law because "There is no question that the illegitimate minors were not only unacknowledged but unacknowledgeable under our law." *Stokes v. Aetna Casualty and Surety Co., 257 La. 424, 242 So.2d 567 at 570 (Barnham, J., dissenting).*

* LRS 23:1021 (3) defines "children" for the purposes of the workmen's compensation law to include only those "illegitimate children acknowledged under the provisions of Civil Code Article 203, 204, and 205." Article 204 provides that "Such acknowledgment shall not be made in favor of children whose parents were incapable of contracting marriage at the time of conception; however such acknowledgment may be made if the parents should contract a legal marriage with each other." The father of the two illegitimate children in the instant case remained married to his first wife—the mother of his four legitimate children—until his death. Thus, at all times he was legally barred from marrying

Thus, the two illegitimate children were barred *absolutely* from ever sharing equally with their legitimate half-brothers and sisters in the proceeds of a workmen's compensation award for the death of their mutual father. The barrier was even more "insurmountable" than in the *Levy* case, where the children could have been acknowledged and thereby permitted to recover under the wrongful death statute. Thus, the case for reversal is even stronger here than in *Levy*.

**D. Labine v. Vincent should be limited
to issues involving inheritance**

Labine dealt with laws by which states regulate the inheritance of private property. History might support a broader range of state discretion in this area, thereby justifying a classification based on illegitimacy as reasonably related to the goals of the inheritance statute. Thus, there arguably may be a valid state interest in providing for "the stability of . . . land titles and the prompt and definitive determination of the valid ownership of property left by descendants." *In Re Vincent*, 229 So.2d 449, 452 (La. Ct. App. 1969). The Supreme Court has long recognized a broad scope of state power here. *Mager v. Grima, supra; Lyeth v. Hoey, supra*. Moreover, it is taken for granted that an individual has a considerable area of choice as to whom he will bequeath his prop-

Willie Mae Weber, the mother of the two illegitimate children. It therefore was *impossible* for him to legally acknowledge his illegitimate children and thereby qualify them for protection under the Workmen's Compensation Act. See also *Williams v. American Emp. Ins. Co.*, 237 La. 101, 110 So.2d 541 (1959), in which the Louisiana Supreme Court held that a posthumously born *illegitimate* child cannot be classified as a child entitled to workmen's compensation benefits, as defined under LRS 23:1021(3).

erty. Thus, state regulations, such as that in *Labine*, that arguably seek to effectuate the probable choice of the individual in disposing of his property might be given more leeway, particularly if the individual was free during his lifetime to ignore or significantly mitigate the state classifications. It is important to note in this connection that the father in *Labine* could have legitimated his daughter or provided for her in a will, a point stressed both by the Court and by Justice Harlan in his concurring opinion.

Thus, the *Labine* case can and should be limited to state regulation of inheritance where the state classification bears a reasonable relationship to the purpose of the regulation and where the discriminatory impact of the classification can be reversed or modified by the action of the individuals involved.

II.

The discrimination imposed against the illegitimate children in this case violates the Due Process Clause of the Fourteenth Amendment because it furthers no valid state purpose and it deprives them of rights on the basis of a status over which they have no control.

We have shown in Point I that the relationship between discrimination against illegitimates and any proper state purpose is baseless, and that Louisiana has violated the Equal Protection Clause by discriminating against illegitimate children. There is in addition a violation of due process because the State has arbitrarily barred certain children from suing for compensation for their father's work-related death, and state imposition of disabilities "on a wholly arbitrary standard or on a consideration that

offends the dictates of reason offends the Due Process Clause." *Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 249 (1957) (Frankfurter, J., concurring).⁵

Furthermore, the decision below is violative of the children's due process rights because it denies them rights on the basis of a condition of birth and a status over which they had no control and which they are powerless to correct. This Court has recognized in several contexts that it is impermissible to hold an individual responsible for his status or conduct over which he has no control.⁶ For example, *Robinson v. California*, 370 U.S. 660 (1962), involved a California statute making it a misdemeanor for any person to "be addicted to the use of narcotics." The Court ruled that the "status" of narcotics addiction is "an illness which may be contracted innocently or involuntarily," and that therefore any punishment for the condition is invalid as "cruel and unusual" under the Eighth and Fourteenth Amendments.

⁵ While "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought," *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955), the statute here is not such a law, but is rather akin to statutes involving an aspect of personal liberty. As to such statutes, the Court has required a showing under the Due Process Clause that some proper state purpose is being pursued through reasonable means. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390; *Pierce v. Society of Sisters*, 268 U.S. 510. This requirement is consistent with the Court's statement in *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), that "[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive...."

⁶ A leading legal philosopher, Professor Lon Fuller, maintains that a rule which an individual has no opportunity to obey is not a law at all but an arbitrary application of governmental force. L. Fuller, THE MORALITY OF LAW 39, 70-73 (1964).

Professor Amsterdam, after discussing the many scholarly reviews of the *Robinson* opinion, concludes that, "Even the narrowest of these interpretations [supports] the notion that punishing a status involuntarily entered into and which cannot voluntarily be abandoned is unconstitutional." Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like, 3 Crim. L. Bull. 205 (1967). This precisely describes the status of the children here, who neither control nor can correct their condition of illegitimacy.

Oyama v. California, supra, brings us even closer to the instant case. There the Court struck down California's Alien Land Law that inflicted harm on a child due to the status of his father. In holding that extraordinary procedural burdens could not be imposed on a citizen in proving the ownership of land merely because his father was an alien ineligible for citizenship, the Court reiterated that distinctions based on ancestry are "by their very nature odious to a free people." 332 U. S. at 646.

The unreasonableness of imposing burdens upon children because of the actions of their parents is exemplified by an explicit constitutional policy. Article III, Section 3, Cl. 2 of the Constitution provides that "The Congress shall have power to declare the Punishment of Treason, but no Attainer of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." While this provision applies in terms only to cases of treason (which had largely occasioned the historic use of corruption of blood in England), it manifests a broader principle of justice—that individuals should not be denied rights because of the behavior of their ancestors which they could

not control. In fact, what Louisiana has done here is similar to the medieval form of punishment by which a "felon's blood was attainted or corrupted", with the result that he could not own property himself, "nor could any heir born before or after the felony claim through him." W. S. Holdsworth, 3 HISTORY OF ENGLISH LAW 69. Indeed, if corruption of blood is explicitly forbidden by the Constitution with respect to the heinous crime of treason, it certainly should not be permitted in lesser contexts.⁷

In sum, Louisiana not only has acted unreasonably, but it has denied rights to blameless individuals for the acts of others without factual or other adequate justification and it has flouted some of the most conspicuous decisions of this Court holding that a State cannot harm individuals on the basis of their ancestry. Such action by Louisiana is arbitrary and therefore inconsistent with the Due Process Clause of the Fourteenth Amendment.

⁷ See also 18 U. S. C. §3563 (1948), which provides generally that "no conviction or judgment shall work corruption of blood or forfeiture".

CONCLUSION-

For the reasons stated above, the judgment of the Supreme Court of Louisiana should be reversed.

- Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF LOUISIANA

BRIEF FOR RESPONDENTS

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TABLE OF CONTENTS

	Page
STATEMENT	1
ARGUMENT:	
The classification in Louisiana's Workmen's Compensation Law of unacknowledged illegitimate children as "other dependents" is not invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States	2
CONCLUSION	8

TABLE OF AUTHORITIES

CASES:

<i>Levy vs. Louisiana</i> , 391 U.S. 68, 88 S.Ct. 1509 (1968)	2, 4, 5, 6, 7, 8
<i>Labine vs. Vincent</i> , 401 U.S. 532, 91 S.Ct. 1017 (1971)	2, 4, 5, 6, 7, 8
<i>Thompson vs. Vestel Lumber & Mfg. Co.</i> , 208 La. 83, 22 So.2d 842 (1944)	4
<i>Fidelity & Casualty Co. of New York vs. Ivory</i> , 129 So.2d 894 (La. App. 1961)	4
<i>Jenkins vs. Pemberton</i> , 87 So.2d 775 (La. App. 1956)	4
<i>Stokes vs. Aetna Casualty and Surety Company</i> , 257 La. 424, 242 So.2d 567 (1971)	7

STATE STATUTES:

Louisiana Revised Statute, Title 23, Section 1232	2, 3, 4, 5, 6, 7
Louisiana Revised Statute, Title 23, Section 1021(3)	3, 5, 6
Louisiana Revised Civil Code, Article 2315	5
Louisiana Revised Statute, Title 23, Section 1231	5
*Louisiana Revised Civil Code, Article 920	6

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AETNA CASUALTY & SURETY COMPANY, et al.,
Respondents

**ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF LOUISIANA**

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Respondents have no quarrel with petitioner's statement of the case, statement of jurisdiction, statement of the constitutional provision involved, or statement of the question presented for review; therefore, respondents shall not include statements of such in their brief.

ARGUMENT

THE CLASSIFICATION IN LOUISIANA'S WORKMEN'S COMPENSATION LAW OF UNACKNOWLEDGED ILLEGITIMATE CHILDREN AS "OTHER DEPENDANTS" IS NOT INVIDIOUS DISCRIMINATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Respondents agree with petitioner that the crucial issue in this case is whether different treatment of legitimate and illegitimate children under Louisiana's Workmen's Compensation Law falls within the reasoning of *Levy vs. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509 (1968) or within the reasoning of *Labine vs. Vincent*, 401 U.S. 532, 91 S.Ct. 1017 (1971). Respondents respectfully submit the case does and should fall within the reasoning of the *Labine* decision; that there is no invidious discrimination present and petitioner's claim should be denied.

Section 1232 (LSA-R.S. 23:1232) of the Louisiana Workmen's Compensation Law sets up the schedule of payment of workmen's compensation benefits to various classifications of dependents; as follows:

"Payment of dependents shall be computed and divided among them on the following basis:

- (1) If the widow or widower alone, thirty-two and one-half per centum of wages..
- (2) If the widow or widower and one child, forty-six and one-quarter per centum of wages.
- (3) If the widow or widower and two or more children, sixty-five per centum of wages.
- (4) If one child alone, thirty-two and one-half per centum of wages of deceased.

- (5) If two children, forty-six and one-quarter per centum of wages.
- (6) If three or more children, sixty-five per centum of wages.
- (7) If there are neither widow, widower, nor child, then to the father or mother, thirty-two and one-half per centum of wages of the deceased. If there are both father and mother, sixty-five per centum of wages.
- (8) If there are neither widow, widower, nor child, nor dependent parent entitled to compensation, then to one brother or sister, thirty-two and one-half per centum of wages with eleven per centum additional for each brother or sister in excess of one. If other dependents than those enumerated, thirty-two and one-half per centum of wages for one, and eleven per centum additional for each such dependent in excess of one, subject to a maximum of sixty-five per centum of wages for all, regardless of the number of dependents."

Section 1021(3) (LSA-R.S. 23:1021(3)) of Louisiana's Workmen's Compensation Law provides the following definition for the terms "child" or "children" as used in Section 1232:

"As used in this Chapter, unless the context clearly indicates otherwise, the following terms shall be given the meaning ascribed to them in this Section:

- * * *
- (3) "Child" or "Children" covers only legitimate children, step-children, posthumous children, adopted children, and illegitimate children acknowledged under the provisions of Civil Code Articles 203, 204, and 205."

Thus, a legitimate child or an illegitimate acknowledged child is treated equally in the distribution of workmen's compensation benefits.

Unacknowledged illegitimate children have been consistently, under the jurisprudence of Louisiana, classed as "other dependents" under the provisions of Section 1232(8). *Thompson vs. Vestel Lumber & Mfg. Co.*, 208 La. 83, 22 So. 2d 842 (1944); *Fidelity & Casualty Co. of New York vs. Ivory*, 129 So. 2d 894 (La. App. 1961); and *Jenkins vs. Pemberton*, 87 So. 2d 775 (La. App. 1956). Petitioner, in this case, is the mother of two illegitimate unacknowledged children who essentially is seeking to have her children moved up from the classification of "other dependents" of Section 1232(8) to that of "children" within 1232(6):

In order to determine the disposition of this matter, this case should be contrasted first with the *Levy* decision and then the *Labine* decision. Quite obviously, the first contrast which should be drawn with the *Levy* decision is the fact that *Levy* dealt specifically with a tort situation. In the case at bar, Louisiana's Workmen's Compensation Law is involved, not tort law. This distinction was also drawn in the *Labine* decision in the majority opinion. 401 U.S. _____. Further, the *Levy* decision noted that there was a wrong inflicted on the mother of the illegitimate children and that the tort feasor was going to free unless the illegitimate children were allowed to recover. In this case, there was no wrong committed in any manner by respondents and no tort feasor is going free as respondents had an obligation to pay compensation benefits which was discharged under Louisiana's Workmen's Compensation Law.

In addition, there is no insurmountable barrier created by the State of Louisiana for an illegitimate to obtain workmen's compensation benefits as there was prior to *Levy* in Louisiana's tort law. As was discussed hereinabove, an unacknowledged illegitimate does receive workmen's compensation benefits under Section 1232(8) which was not true under tort law, and if acknowledged, receives workmen's compensation benefits equally with legitimate children as provided in

Section 1021(3). Louisiana Civil Code Article 2315 (LSA-C.C. Art. 2315) setting up persons entitled to recover in tort prior to *Levy* absolutely excluded illegitimate children from tort recovery, which is clearly to the contrary in the case of Louisiana's Workmen's Compensation Law, which was noted by the Court in the *Levy* decision in Footnote 7 to the Court's opinion. 391 U.S. 72.

On Page 9 of petitioner's brief, petitioner indicates that the judgment of the trial court in this case (R.32-33) recognized petitioner's rights under Section 1232(8) but said recognition is regarded as meaningless. The rights of an illegitimate under Section 1232(8) are not meaningless; as said section clearly provides that if there are no other dependents in the preceding classifications, then a sufficient number of illegitimate children could receive workmen's compensation benefits up to the maximum rate of sixty-five per cent of the employee's wages.

In addition, if there are an insufficient number of dependents in the preceding classifications to use up the maximum rate of benefits, then the illegitimate children under subsection 8 would get the remainder of the benefits. Also, in this particular case it is possible for two or more of the legitimate children to not live and recover the workmen's compensation benefits during the entire benefit period of 400 weeks (LSA-R.S. 23:1231) which would permit the remainder to go to the illegitimate children under subsection 8. Thus, the right afforded unacknowledged illegitimate children under subsection 8 is a real and meaningful right, although at present in this particular case, there is no recovery to petitioner.

In comparing this case with *Labine*, it should be noted that this case is much closer to *Labine* and indeed an improvement of many of *Labine*'s points of distinction. As *Labine* noted, there is no insurmountable barrier as is present in